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CAV/OP

BEFORE THE HON'BLE HIGH COURT OF CHHATTISGARH AT BILASPUR

In the Matter of W.P.NO. 1867 /2003.

PETITIONER

MECGALE PNEUMATICS, a Partnership Firm, registered under the Indian Partnership Act having its registered office at N65 MIDC Hingna Industrial Area, Nagpur (Maharashtra) represented through : the Manager, Abhijit Sarkar, aged about 34 years, son of Shri Ajit Kumar Sarkar, resident of 301 Neel Tarang, Apartment, 9 Amrawati Road, Nagpur, Maharashtra.

P. R. No. 1660/03
Presented by Shri Sanjay Kr. Agrawal
dated 20.06.03

VERSUS

RESPONDENT

1. Bhilai Electrical Supply Company Limited, 587 5th Floor Ispat Bhawan Bhilai, Distt. Durg, through : General Manager.

2. Manager, Contract and Services Bhilai Electrical Supply Company Limited 587/5th Floor Ispat Bhawan Bhilai (Chhattisgarh).

PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT IN THE NATURE OF MANDAMUS

(98) A F R

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR (C.G.)

SINGLE BENCH*: HON'BLE SHRI L.C. BHADOO, J

WRIT PETITION NO.1807 OF 2003

O R D E R

POST IT FOR: 23rd/07/2003

Sd/-
L.C.BHADOO
Judge

A.F.R.

(99)

HIGH COURT OF JUDICATURE CHHATTISGARH: BILASPUR

SINGLE BENCH: HON'BLE SHRI L.C. BHADOO, J

WRIT PETITION NO.1807 OF 2003

MECGALE PNEUMATICS

VERSUS

Bhilai Electrical Supply Company Limited and another

Present: Shri Kishore Bhaduri, Advocate for the petitioner.
Dr. N.K. Shukla, Sr. Advocate with Shri Ayaz Naved Advocate, for the respondents.

O R D E R

(Passed on 2nd of July 2003)

By this writ petition filed under Article 226/227 of the Constitution of India the petitioner, a registered Partnership Firm registered under the Indian Partnership Act under Registration No.NGP/1441/90-91 and engaged in the work of manufacturing, supplying, marketing and distribution of materials for civil, mechanical and constructions, has challenged the decision and action of the respondents for inviting a tender for supply and installation of scraper conveyer and clinker venture for disposal of ash in the Thermal Power Plant through a Tender Document (Annexure-P/3).

(2) The main challenge in this writ petition is Clause (B) of the Qualifying Requirements by which the respondents among others has fixed the eligibility criteria for a tenderer that "the bidder must have executed a single contract of value not less than Rs.72.00 Lakhs

for supply and installation of scraper conveyer of capacity not less than 4 ton per hour each and clinker grinder of capacity not less than 10 ton per hour each, for boiler having capacity 50 MW or more during last five years preceding the date of NIT (Notice Inviting Tender)". The contention of the petitioner/Firm is that this qualifying requirement is arbitrary, unilateral and have been initially put to place the petitioner out of the run. It has been mentioned in the petition that the petitioner/Firm is engaged in manufacturing the conveyer system, ash handling system, lime cutting system, water treatment system and also affluent treatment system accessories. The petitioner has annual turn over Rs.1,59,48,723/- and has till date supplied the materials to all measure companies. The list showing the measure areas executed by the petitioner has been filed in the petition marked as Annexure-P/5. The petitioner qualified in every count and accordingly submitted the document. The only non-qualifying condition so put for the by the respondents was execution of single contract worth more than Rs.72/- lakhs. The petitioner/Firm declares that the petitioner has executed many contracts worth more than Rs.45/- lakhs. The respondent so as to oust the petitioner of the competition has initially put this clause of executing single contract worth Rs.72.00 Lakhs. Putting of such clause is not only unfair but is also arbitrary, unreasonable and does not come within the act for public good or under public interest. The intention of the respondent is writ large by such clause and therefore the said act is voilative of the principles of equal opportunity and amounting abuse of power by putting the clause. The respondent authorities have committed a breach of rules of natural justice and thus reached to a conclusion of putting such clause without any justification, therefore, the same amounts to abuse of its power. The

petitioner has sought for a relief that the clause so far as it relates to the execution of single contract worth Rs.72.00 Lakhs be quashed.

(3) The return has been filed on behalf of the respondents. Is is submitted that apart from the petitioner, nine other contractors made requests for issuance of the tender form. Out of these nine requests, three requests were turned down on the ground that they are not fulfilling the qualifying requirements. The request of other two contractors including the petitioner was allowed and tender form was issued with a specific stipulation that they will submit the papers pertaining to the qualifying requirements before ten days from the date of opening of the tenders, and thus tender forms were issued to them with the condition and four contractors were found fully eligible to compete the tender. The tender forms were issued to the contractors who have legal interests in the contract on the basis of doctrine of Legitimate Expectations. Not only that, if the qualifying requirement is reduced to the wishes and likings of the petitioner, then other contractors who are operating in the same field and have made requests for issuance of the tender forms because they are not fulfilling the qualifying requirement would be deprived of their legal rights to participate in the tender process. It is specifically denied that this qualifying requirement is with intend to advance some person or to deprive some person to participate in that tender process. The qualifying requirement is put only in order to ensure that the work to be allotted may be completed without hindrance by a best person on a rate which is most suited to the respondents. Therefore, the contents of paragraph 3 of the writ petition that the qualifying requirement has been made in the tender with an intend to monopolize or to prefer one contractor over others is wrong. The answering respondent is a Joint Venture of Steel Authority of India Limited and

National Thermal Power Corporation as stated by the petitioner and to follow the policy of NTPC with respect to the contract functions. It is also submitted that the amount of Rs.72.00 Lakhs has been calculated by the answering respondent as 2/3rd of the total amount of the contract. The total amount is Rs.1,08,000,oo/p of which the 2/3rd is Rs.72,00 lakhs. The petition is also liable to be dismissed on the ground that the petitioner is suppressing the material in the petition and the petitioner did not possess the eligibility qualifications. However, he represented that he can submit the same 10 days before the date of opening of the tender the requisite qualifications/documents. On this basis the conditional tender form was issued to him. It is specifically denied that clause of inclusion of qualifying requirement of Rs.72.00/- Lakhs is with an intend to oust the petitioner of the competition. It is made clear that the answering respondent is a new Company recently incorporated as a Joint Venture Company comprising with National Thermal Power Corporation Limited and Steel Authority of India Limited. The petitioner has no contract with the answering respondent in the past. There is no material which shows that it is the petitioner to whom the answering respondent wanted to exclude and for that this clause is put. Rather this clause has been included by the answering respondent which is adhered by National Thermal Power Corporation Limited and it is an established policy that contract must be given to a person who have experience of completing the work which is at the 2/3rd value of the contract.

(4) I have heard Mr. Kishore Bhaduri,learned counsel for the petitioner and Dr. N.K. Shukla, Sr. Advocate, for the respondents.

(5) The main thrust of the arguments of the learned counsel for the petitioner is that fixing of such eligibility criteria that the

tenderer must have executed one work worth Rs.72/- Lakhs is arbitrary and irrational. He argued that the whole work is of Rs.1,08,00,000/- and therefore the maximum condition could have been up to Rs.40/- lakhs. He tried to impress upon the Court, by showing a chart that in the past in the year 2001 NTPC issued a tender inviting bids in which one work of Rs.30/- lacs was fixed as eligibility criteria. Therefore, he argued that the decision is arbitrary.

(6) On the other hand, Dr. N.K. Shukla, Senior Advocate, argued that the condition of one work in the year at the value of Rs.72 lakhs has been fixed by the committee after looking into the nature of the work and in order to get the best contractor and that too at the best rate; so that they are able to execute the work within the stipulated period and with the efficiency. It does not lie in the mouth of the petitioner that without citing the specific allegation against the respondents that how the respondents have particularly introduced this eligibility criteria just to oust the petitioner out of the race and making him ineligible. The respondent company is recently set up as a new company and they have no links with anybody and leveling such unfounded allegation against a company without any foundation or evidence and rhyme or reason is very serious in nature and the Court should not allow such balled allegation levelled against the respondents without any basis.

(7) It is true that the respondent company being a joint venture of Steel Authority of India Limited and NTPC is a public company and its come within the definition of the State as per Article 12 of the Constitution of India. Therefore in the strict sense the public element is attached with the respondent Company and

therefore the State actions in contractual field when all actions of the State are meant for public good and expected to be fair and just. The Preamble of the Constitution of India resolves to secure to all its citizens justice, social, economic and political; and Equality of status and opportunity. Every State action must be aimed at achieving this goal. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the fields of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and therefore every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. The Hon'ble Apex Court in the case of **Shrilekha Vidyarthi Vs. State of U.P.** reported in **AIR 1991 SC 537** observed that no doubt, it is true, as indicated by us earlier, that there is a presumption of validity of the State action and the burden is on the person who alleges violation of Article 14 to prove the assertion. However, where no plausible reason or principle is indicated nor is it discernible and the impugned State action, therefore, appears to be ex facie arbitrary, the initial burden to prove the arbitrariness is discharged shifting onus on the State to justify its action as fair and reasonable. If the State is unable to produce material to justify its action as fair and reasonable, the burden on the person alleging arbitrariness must be held to be discharged. In Dwarkadas Marfatia's case (AIR 1989 SC 1642) the Court held that to oversee the State action for the purpose of satisfying that it is not vitiated by the vice of arbitrariness and no more. The wisdom of the policy or

the lack of it or the desirability of a better alternative is not within the permissible scope of judicial reviews in such cases. It is not for the Courts to recast the policy or to substitute it with another which is considered to be more appropriate, once the attack on the ground of arbitrariness is successfully repelled by showing that the act which was done, was fair and reasonable in the facts and circumstances of the case.

(8) The Hon'ble Apex Court in the case of **Tara Cellular Vs. Union of India** reported in **AIR 1996 SC 11** held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. The Court further observed that the duty of the Court is to confine itself to the question of legality. Its concern should be: (1) whether a decision-making authority exceeded its powers ? (2) committed an error of law; (3) committed a breach of the rules of natural justice; (4) reached a decision which no reasonable Tribunal would have reached; or (5) abused its powers. Therefore, it is not for the Court to determine whether particular policy or particular decision taken in the fulfilment

of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely Wednesbury unreasonableness.

(iii) Procedural impropriety

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.

The principles deductible relating to scope of judicial review of administrative decisions and exercise of contractual powers by government bodies are :

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own

decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitations to tender is in the realm of contract. Normally speaking the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Therefore, in view of the above law laid down by the Apex Court that all the actions of the State are to be presumed to be valid and the burden is on the person who alleges violation of Article 14 to

prove the assertion that the act of the State or public authority suffers from the vice of arbitrariness.

(9) Similarly, in the second decision the Apex Court has held that while dealing with the case of arbitrariness, unreasonableness in the matter of contracts which are being entered by the Government are illegal, irrational and there is procedural impropriety and while looking into these aspects certain limitation has been laid down for judicial review of the decision as mentioned in the earlier part of this judgment while referring the cases decided by the Hon'ble apex Court.

(10) Now in the light of the above decisions we have to examine the facts of the present case as to whether the decision of the respondents to fix the eligibility criteria that the tenderer must have executed one work of Rs.72/- lakhs in a year suffers from vice of arbitrariness, unreasonableness or irrational in the light of the above decisions of the Supreme Court. If we look at the petition of the petitioner the allegation has been levelled by the petitioner that the respondents have put this eligibility criteria so high and strict in order to ensure that the petitioner ousted from the competition and to become ineligible to file his tender. In the petition as well as in the argument the learned counsel appearing for the petitioner could not point out any such specific allegations against the officers of the respondents Company that how they are interested in ousting the petitioner and how they are interested to include some one in the contract. The only thrust of the counsel for the petitioner is that the eligibility criteria is excessive. The whole work is of Rupees one crore eight lacs and fixing the criteria that the tenderer must possess experience of executing a single work in a year of Rs.72 lacs is very

high and normally in the given situations it should not be more than 32 to 40 lacs. This is the petitioner's own estimate and own thinking whereas the respondents have mentioned in the return that they have fixed this criteria only in order to get best person at the best rate.

(11) On the other hand, the learned counsel appearing for the respondents argued that this criteria has been fixed by the High Power Committee at the initial stage while taking a decision for inviting the tenders for this work in order to achieve the objectives that by putting this condition they must get the best tenderer who is able to execute the work within the stipulated time, efficiently and up to the expected level of the respondent Company that too at the best rate. He further argued that the total amount fixed for one work is not come beyond 2/3rd of the whole tender. Therefore, this cannot be said to be unreasonable. He further argued that the respondent company is recently newly established company and they have no interest or bias in favour or against anyone. The decision regarding qualifying requirement taken by four senior officers of the Company has been annexed with the return in which Manager (F&A), Manager (TS), one Senior Manager (C&M) and the other is Senior Superintendent; these four highly placed officers in their wisdom based on their past experience decided this eligibility criteria. So their decision to fix the eligibility criteria, without any specific instance that they have acted against any rules or showing that they have committed any error of law or exceeded their powers or abused their powers while taking such decision by any stretch of imagination their decision cannot be said to be arbitrary, unreasonable, irrational or illogical. As has been held by the Apex Court in the above quoted judgments that the right to decide the term of invitation to tender is not open to judicial scrutiny. Further held that it is not for the Court

to determine whether particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Learned counsel appearing for the petitioner was not able to point out any irrational, arbitrary or procedural impropriety by which the respondents have fixed the eligibility criteria. If we look at the return filed by the respondents shows that even at this eligibility criteria they have been able to get four eligible contractors who are eligible to compete the tender. While dealing with the arguments of the learned counsel we have to see that even after fixing this eligibility criteria number of four contractors are still available in order to have the fair competition among the tenderers so that no one should monopolies and able to get high price.

(12) As mentioned above four eligible tenderers have already put in their papers, therefore, the arguments advanced by the learned counsel for the petitioner is devoid of any force. Even if the example cited by the learned counsel for the petitioner that the NTPC in some cases have put the eligibility criteria Rs.30 to 40 lacs of one work in which a total cost of work was Rupees one crore 40 lacs something. Merely on this basis the decision taken by the respondents officers cannot be said as arbitrary as has been mentioned above it depends upon case to case that in the given situation whether the particular decision has been taken irrationally or with an abuse of power or breach of any rules of natural justice is to be seen.

(13) In view of the above, I am of the opinion that the petitioner has not been able to successfully advance and impress upon the Court that the decision of the respondents by fixing the eligibility,

criteria that the tenderer must have executed a work in one year of Rs.72 lacs is arbitrary and suffers from the vice of arbitrariness. Therefore, the writ petition filed by the petitioner is without force and the same is liable to be dismissed and it is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge

2nd/07/2003

Brajesh*